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No. 483

Supreme Court, U.S.
FILED
OCT 16 1959
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NATIONAL SURETY CORPORATION and
UNION TRUST COMPANY,
ST. PETERSBURG, FLORIDA,

Petitioners,

-vs-

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
LLEWELLYN MACHINERY COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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leave to file this Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit.

The Petitioners, National Surety Corporation and Union Trust Company pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on June 29, 1959, reversing, with a dissenting opinion, the Judgment of the United States District Court for the Southern District of Florida, Miami Division, which dismissed the Complaint filed by the United States for the use of Llewellyn Machinery Corp. Petition for Rehearing was timely filed in the United States Court of Appeals and was denied by order of said Court entered July 29, 1959.

CITATIONS TO OPINIONS FROM THE COURTS BELOW

The unreported order of the United States District Court for the Southern District of Florida, Miami Division, dismissing the Complaint appears on pages 50 and 51 of the Record printed for the use of the United States Court of Appeals below and filed with this petition pursuant to Rule. The opinion of the Court of Appeals for the Fifth Circuit reversing the said Order of the District Court appears on pages 58-64 of the said printed record and is reported in **268 F. 2d 610.** The unreported judgment of the Court of Appeals appears in the said printed record at page 65. The unreported order of the said Court of Appeals, denying the Petition for Rehearing appears in said printed record on Page 72.

GROUNDS ON WHICH THE JUDISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

The jurisdiction of the United States Supreme Court is invoked on the ground that the United States Court of Appeals, Fifth Circuit, has rendered a decision in conflict with one of its previous decisions without impliedly or expressly overruling or reversing the previous decision.

For an additional ground petitioners state that the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but should be, settled by the United States Supreme Court.

The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with one of its previous decisions on the same matter and on an important Federal Question, arising under a Federal statute and which will restrict the writing of Surety Bonds under the Miller Act by every bonding company in the United States. The law established by the said subsequent and conflicting opinion will result in impossible compliance with the bond provisions of the Miller Act for the reason that the bonding companies will not become sureties on such bonds where exposure is unlimited and they are by law made insurers of all risks, the provisions of the bond and the act to the contrary notwithstanding. (R-63).

(i) The date of the Judgment sought to be reviewed is June 29, 1959 and its entry was on June 29, 1959 (R-65).

(ii) The order denying Petition for Rehearing was entered on July 29, 1959 (R-72).

(iii) The Supreme Court has jurisdiction to review the said judgment and opinion under 28 USCA, §1651 (a) and 28 USCA, §1254 (1).

QUESTION PRESENTED

DOES A BOND SUPPLIED PURSUANT TO THE PROVISIONS OF THE MILLER ACT AND WRITTEN PURSUANT TO THE DIRECTIVES OF THAT ACT AND NOT AS A RESULT OF ARMS LENGTH DEALING BETWEEN PARTIES COVER THE ORIGINAL PURCHASE PRICE FOR OR REPLACEMENT VALUE OF EQUIPMENT?

FEDERAL STATUTE INVOLVED

The Federal Statute involved is the Miller Act, 49 Stat. 793 (1935), 40 U.S.C. 270 a-d (1952).

"§270a **Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.**

"(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sure-

ties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000, the said payment bond shall be in the sum of $2,500,000.

* * *"

"270b. **Same; rights of persons furnishing labor or material.**

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the

labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: PROVIDED, HOWEVER, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and in the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which

the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, §2, 49 Stat. 794."

CONCISE STATEMENT OF THE CASE

On or about July 22, 1955, the United States of America entered into a written contract with Thomson Contracting Company, Inc., for the construction of Mooring Dolphins at the Joint Long Range Proving Grounds, British West Indies (R. 14, 15). The consideration to be paid the contractor was $143,000. In accordance with the provisions of 40 USC, §270a, Thomson Contracting Company, Inc., as principal, and National Surety Corporation, as surety, executed and delivered to the United States their payment bond (R. 16-19). Thereafter, the said contractor rented equipment from Llewellyn Machinery Company. While the equipment was in transit to the job site in the Caribbean Sea the vessel upon which it was being transported sank and the equipment was lost. After the execution of the said contract by Thomson and the United States Government dated July 22, 1955, and the execution of the surety bond as aforesaid and the loss of the machinery by sinking, the Llewellyn Machinery Company and the said contractor agreed that the value of the machinery was $17,400 (R. 17).

After all of the foregoing, and on May 7, 1956, when the rented equipment had already been lost at sea, the

contractor executed and entered into an arrangement, other than a rental contract, with Llewellyn Machinery Company. Under the new arrangement, the contractor Thomson, being in need of the type of equipment that was lost and being without funds with which to purchase it, the said Llewellyn Machinery Company supplied the money for the purchase and delivery of the equipment and in turn took back from it, the contractor, a note, which was later discounted to put Llewellyn back in funds which had been disbursed in the purchase of the replacement equipment. As security for payment of the note Llewellyn then took a Retain Title Contract from Thomson, covering the replacement machinery (R. 47-49). One Thousand Dollars was paid to Llewellyn by Thomson at or about the date of the execution of the note and contract on May 7, 1956. Of the $17,400 value agreed upon between Thomson and Llewellyn after the sinking of the machinery, $16,400 remained unpaid at the time of the institution of the subject litigation (R. 47-49).

The Respondent, in its attempt to state a cause of action in the Federal District Court for the Southern District of Florida, Miami Division, filed on August 12, 1958, and came to rest upon, its Second Amended Complaint (R. 26-30). By that date, Third Party Proceedings had been instituted by the original defendant, National Surety Corporation, and in which Union Trust Company of St. Petersburg, Florida, had been brought into the proceeding as Third Party Defendant. To the Second Amended Complaint, and on August 20, 1958, the Third Party Defendant filed answer and defenses (R. 31-33). To the Second Amended Complaint the original defendant, National Surety Corporation, on September 18, 1958, filed its answer (R. 35-41).

The original defendant and the Third Party Defendant filed motions for summary judgment on September 22, 1958 and October 1, 1958, respectively (R. 42-43) and Motions for Judgment on the Pleadings on September 22, 1958 and August 20, 1958, respectively (R. 41 and 34).

On December 5, 1958, an order was signed by the Honorable Emett C. Choate, United States District Judge in the District Court of the United States for the Southern District of Florida, Miami Division, and was entered December 5, 1958, granting the said Motions for Judgment on the Pleadings and respondent's cause of action was dismissed at its cost for the reason that the said District Judge was of the opinion that the loss did not come within the purview of the Miller Act and the National Surety Corporation surety bond filed in conformity with the act (R. 50-51).

On December 31, 1958 the Respondent filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, appealing from the said order of dismissal entered December 5, 1958 (R. 51-52). On the appeal pursuant to the aforesaid notice, the Order of December 5, 1958 was reversed by Judgment and Opinion of the United States Court of Appeals, Fifth Circuit, from which there was a dissent, with directions for further proceedings in the lower court not inconsistent with the said Opinion (R. 58-64).

The basis for Federal jurisdiction in the Court of First instance was a provision of the Miller Act, 49 Stat. 794, 40 USCA 270b (b).

ARGUMENT

The Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but should be settled by this Court. That Court has decided that replacement value of equipment and machinery leased for use upon a public project is recoverable under a surety bond posted pursuant to the requirements of the Miller Act. The strongest reason that can be offered for this Court to settle that particular question is that the Court of Appeals for the Fifth Circuit in its opinion in **Massachusetts Bonding and Ins. Co. v. U. S.**, 88 F. 2d 388, 390, March 1937, specifically and emphatically held that the original purchase price for equipment, which in this case is the equivalent of replacement value, was not covered by a surety bond posted under the Miller Act. By the majority opinion in the instant case that Court has created such a conflict that the law on this subject is now totally upset, disturbed and in a state of conflict. This does not result from conflicting opinions in different circuits but from a conflicting opinion within the same circuit wherein the Court did not reverse or specifically overrule its 1937 opinion in the **Massachusetts Bonding and Ins. Co.** case, supra. This predicament is especially regrettable in view of the fact that one member of the Court of Appeals for the Fifth Circuit stated in his strong dissenting opinion in the instant case that the **Massachusetts Bonding** case was one wherein a well reasoned opinion had been written and the case had perhaps become the leading case in the field.

It is made clear in Judge Hutcheson's dissenting opinion (R. 62-64) that this conflict of opinions within the Fifth Circuit results from a strained conclusion in the majority

opinion and from the over use of the cliche that liberal construction should be given to remedial statutes in order that appellate courts may depart from the judiciary field and invade the legislative fields. Judge Hutcheson, like most any member of the Bar, recognizes that the cliche has its place in jurisprudence.

The determination by the United States Supreme Court of the question involved in the instant case and as posed in this Petition is imperative because it involves a Federal Statute, the application of which is national in scope. The amount of money in this controversy is not the important factor to the petitioners, but the petitioner, National Surety Corporation, as well as every surety bonding company in the United States is entitled to judicial instruction as to the limit of its liability or exposure when called upon to post surety bonds pursuant to the Federal act here involved.

By its majority opinion in the instant case, the Fifth Circuit Court of Appeals, without judicial precedent or any basis known to the dissenter from that opinion or known in law generally, has now decided that when a surety bond is posted under the Miller Act, it becomes an all risk insurance policy and the surety on the bond becomes an all risk insurer without limitation as to types of claims recoverable. Such reasoning and interpretation goes way beyond liberal construction of remedial statutes.

On public works projects a surety bond is not supplied by a contractor because of the whim or desire of the United States. It results from a compulsory requirement flowing from a Federal law. The Miller Act requires that on such projects a performance and a payment bond must

be posted by the contractor, and upon which there shall be a surety. The payment bond is to make certain that those who supply labor and material to the contractor will be indemnified against loss to an extent. The bond is not posted as a result of any arms length dealing between parties as was suggested in the majority opinion in the instant case. You cannot exclude from coverage of the bond any obligation to pay for labor or material within the financial limits of the bond. There is no necessity to incorporate into such a bond provisions excluding matters other than labor and material for the reason that such matters do not come within the bond required. If the surety company in the instant case, as well as the sureties in any other case, could believe what it read from the opinion of the **Massachusetts Bonding and Ins. Co. v. U.S.** case, supra, then it would be entitled to believe that it was not necessary to incorporate any provisions within the surety bond which would exclude the liability for replacement cost of equipment. In that case, the Fifth Circuit said on page 390:

> "As to the 15 leased trucks, their original purchase price, being for equipment, was not covered by the bond * * * *"

Earlier and on page 389 of the **Massachusetts Bonding** opinion, the Fifth Circuit Court of Appeals stated:

> "The parties here concede on the one hand that the supplying by sale to the contractor of equipment which should last over several jobs is not covered by the bond, though rental of such is * * *"

From the authorities cited by the Court following the above quotation you can only conclude that the Fifth Circuit agreed with the understanding which counsel had reached in that case to the effect that equipment supplied to a contractor which would last over several jobs is not covered by a bond given on any particular job. It would seem to make little difference whether it was supplied by sale, rental or what have you; the point being that replacement value is not recoverable under the bond though rental of the equipment might be. The Court in the majority opinion in the instant case took some comfort from the pronouncement in **United States for the use of Norfolk So. Ry. v. Taylor,** 268 F. 635 (1920) Affirmed 4 Cir. 277 F. 945.

Judge Hutcheson dissented from that majority opinion, very correctly pointing out that the Norfolk case was not authority for the proposition that replacement value of equipment supplied upon a public project was recoverable under a Miller Act bond. It clearly appears from the Norfolk opinion, as pointed out by Judge Hutcheson, that the only proposition settled in that case was that rental and repair of equipment was covered by a Miller Act Bond.

CONCLUSION

No one would deny that the Miller Act or any other law should be construed, whether liberal or otherwise, in such a manner that the purposes for which the Act is enacted will be realized. A construction of the Miller Act on an unlimited liberal basis for the protection of materialmen and without any thought of protecting the contractor or surety would be half justice. The provision

of the Miller Act requiring a payment bond to protect laborers and materialmen is a good one and the terms and provisions of the Act should not be construed in such a way and on such a liberal basis that the surety bonding companies cannot be induced to join in such a bond. If the Act is construed in that manner and there is no limitation upon the type of claim covered by the Act or the bond and the bonding company's exposure to unlimited claims would make it an insurer of all risks then it is common, ordinary every day business sense that no bonding company would join without demanding prohibitive premiums and commerce would thereby be perilously affected. Certainly, Congress had no such intent when this Act was enacted though the Court of Appeals for the Fifth Circuit, in following the liberal construction of remedial statutes ascribes such intent to Congress. It is vigorously contended by Petitioners that the majority opinion of the Court of Appeals for the Fifth Circuit is erroneous, and lacks support in any prior judicial precedent.

It is respectfully submitted that this petition should be granted and the said majority opinion reversed and the Judgment of the United States District Court for the Southern District of Florida, Miami Division, reinstated.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned, WALTER HUMKEY, does hereby certify that a copy of said Petition for Certiorari was served by United States mail under Rule 33 of the Rules of the United States Supreme Court on the 6th day of October, 1959, by depositing a copy thereof in a United States Mail Box with first-class postage prepaid, addressed to WAKEFIELD AND UNDERWOOD, Ainsley Building, Miami 32, Florida, the counsel of record for the respondent.

WALTER HUMKEY

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FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NATIONAL SURETY CORPORATION and
UNION TRUST COMPANY,
ST. PETERSBURG, FLORIDA,
Petitioners,

-vs-

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
LLEWELLYN MACHINERY COMPANY,
Respondent.

Appendix to the
Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

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App. A

JUDGMENT.

Extract from the Minutes of June 29, 1959.

UNITED STATES OF AMERICA for the use of LLEWELLYN MACHINERY CORPORATION,

No. 17645. versus

NATIONAL SURETY CORPORATION, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered and adjudged that the appellees, National Surety Corporation and Union Trust Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Chief Judge, dissenting."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17645

UNITED STATES OF AMERICA, for the use of LLEWELLYN MACHINERY CORPORATION,
Appellant,

versus

NATIONAL SURETY CORPORATION, ET AL.
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 29, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: The appellant here sued the defendant Surety Corporation under the Miller Act, 40 U.S.C.A. 270(a)-(d). The Surety Corporation was surety of a prime contractor, Thomson Contracting Company which had contracted to build certain works in the Bahama Islands for the United States Government. The

claim here in issue represented the value of certain construction equipment furnished by appellant under a rental agreement whereby the general contractor agreed to pay approximately $1200 per month for the use of the equipment and further agreed to "assume all responsibility for damages or loss to [the said] eqpt."

Appellant duly furnished the equipment to Thomson and the latter shipped it by water to the vicinity of the Bahamas where, shortly thereafter, it was lost at sea without salvage. As is provided under the applicable statute, Thomson provided a payment bond which was furnished by National Surety Corporation, the appellee here.

The trial court, on motion for judgment on the pleadings, it being plain that there was no issue of fact involved, dismissed the complaint, holding "that the loss complained of does not come within the purview of the Miller Act and the defendant's bond filed in conformity therewith." This appeal followed.

It is not disputed by the surety that rental payments contracted for by a general contractor are recoverable under the terms of the Miller Act. See *Illinois Surety Co. v. John Davis Co.*, 244 U.S. 614. Appellant's claim that the obligation undertaken by the prime contractor to make good for any loss of the equipment was an obligation of the same nature as the agreed monthly rental is supported in principle by *Norfolk Southern Rwy. v. Taylor*, 268 Fed. 635, affirmed 4 Cir., 277 Fed. 945. In that case the subcontractor rented certain barges.

In consideration for the use of the barges the subcontractor agreed to pay a daily rental and also agreed to return them in the same condition as they were when he took possession of them. He agreed to make all repairs for which he was liable. Upon the barges being damaged during the course of the work, the lessor of the equipment brought an action for rent and cost of repairs against the surety. In allowing recovery, the Court said: "Assuming that the bond is liable for the contract price of the rental of the scows, it would seem that these items (the repairs) come within the terms of the bond."

Although neither party has been able to cite any case expressly holding that a rental agreement embodying an obligation to make good a loss of rented equipment comes within the terms "labor and material in the prosecution of the work," we bear in mind the language of this Court in *Glasswell-Taylor Company v. Magnolia Petroleum Co.*, 5 Cir., 123 F. 2d 527:

> "The Miller Act . . . is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the congressional intent to protect those who furnish labor or material to public works."

This language is fully justified by that of the Supreme Court in *Illinois Surety Co. v. John Davis Co.*, *supra*, where it is said:

> " . . . Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally in order to effectuate the purpose of Congress declared in the Act.

> In every case which has come before this court, where labor and material were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed if the suit was brought within the period prescribed by the Act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute."

We find nothing to the contrary held or suggested in *Mass. Bonding & Insurance Co. v. United States, etc.*, 5 Cir., 88 F. 2d 388.

We cannot see why an obligation of payment made by the general contractor to the appellant here, which obligation included an undertaking to pay for the loss of the equipment, should not come within the full protection of the bond just the same as would an obligation to make the monthly rental payment standing alone. To the complaint of the appellee that this would place a burden on it not contemplated upon the writing of the bond, it need only be said that in the customary dealings between parties at arm's length it is self evident that the monthly rental payments which were admittedly secured by the bond would have been greater if the risk of loss had remained on appellant. Thus the surety company obtained the benefit of having its undertaking based on a monthly rental of a lesser amount if the contract had been completed without the loss of the equipment. In return for having the benefit of the lower rental payment subject to its guarantee, it, through the terms of the Thomson contract, assumed the risk of loss. It, of course, was with-

in the power of the bonding company when entering its contract of surety to restrict the nature of the obligations which were undertaken by its principal to out and out payments for purchases and/or out and out rental payments had it seen fit to do so. Having failed to restrict the contractor's method of payment so as to exclude an agreement to stand liable for a loss of equipment, appellee cannot complain if it must respond to the extent that Thomson failed to make payments strictly under the terms of the rental agreement it actually made. This agreement included an obligation to reimburse appellant for the value of any equipment damaged or lost in the operation.

The judgment is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion.

HUTCHESON, Chief Judge, dissenting:

Of all the aids to construction of statutes or contracts, the one most likely to swallow up all the other aids, particularly the one which enjoins giving to words their usual, their ordinary, meaning, is the one which, enjoining a liberal construction, overtempts an opinion writer, where there is no restraining authority, to rewrite nearer to his heart's desire the statute or contract under construction.

It is to be expected, therefore, that my brothers, finding neither authority nor language in the contract in support of their view, that *the replacement cost of*

machinery and equipment rented to the prime contractor and lost by the sinking of the vessel in which it was being carried is within the terms of a Miller Act bond. should lean heavily on the greatly overworked cliche that *the Miller Act is highly remedial and it is entitled to a liberal construction and application* to properly effectuate the congressional intent to protect those *who furnish labor or material to public works.*

Confessing that I myself have often drawn comfort in other situations from the same cliche and that I have no objection to its use when it does not result, as it does here, in running a good principle into the ground, my objection to its use here is that it converts the surety on a Miller Act bond into a general insurer up to the limits of its bond of all property, without limit as to its value, leased or loaned to the prime contractor when it is lost or destroyed by him with or without his fault. With deference, this is a conversion which the Miller Act does not envisage and provide for and which, in my opinion, is clearly contrary to its intent and purpose to protect laborers and materialmen, a purpose which would be defeated if such persons were required to share the security of an inadequate bond with such bailors.

In addition to objecting to the conclusion of my brothers as come at too easily by the process of a con-

---

1 Cf. what was said and held by a court, of which my brother Tuttle was a member, in Guidry v. New Amsterdam, 252 F.2d at 235:

> "While it is well settled in Louisiana that the statute should be given a liberal construction and the decision of each case must turn upon its own facts, it is equally well settled there that it is for the legislature and not the courts to extend the act and that it is essential to recovery that the plaintiff bring himself within it."

struction which, as used here, is no more than a forced conclusion, I object, as a complete non sequitur and therefore a begging of the question, to the argument that, because the rental of the equipment is covered, the loss of it by sinking is also.

I vigorously dissent, therefore, as completely unwarranted, from the view that the Norfolk Southern case from the Fourth Circuit, holding as this court did in its well reasoned opinion in the Massachusetts Bonding case, *infra*, that repairs made necessary by the use of equipment on the project were covered by the bond, is authority for the very different holding of the majority here, that the replacement value of property bailed to and lost by the prime contractor was covered by the bond.

Finally, planting myself firmly on what was said and held in the well considered case from this circuit, *Massachusetts Bonding Co. v. U.S.*, 88 F(2) 388, perhaps the leading case in this field, I categorically disagree with the conclusion of the majority that nothing is held or suggested in that case which is contrary to the sweeping addition which is made by the majority to the language of the bond and the statute here.

And now, having unpacked my heart with words as earnest as they are futile, I bring my ineffective disagreement with my erring brothers to a close with the comforting reflection that I have done the best I could to turn them from their way and that the blood of the decision is not on my head.

App. C

ORDER DENYING REHEARING.

Extract from the Minutes of July 29, 1959.

UNITED STATES OF AMERICA for the use of LLEWELLYN MACHINERY CORPORATION,

No. 17645. versus

NATIONAL SURETY CORPORATION, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Hutcheson, Chief Judge, dissenting."

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vs.

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
LLEWELLYN MACHINERY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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FOR THE USE AND BENEFIT OF
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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

APPEARANCE OF COUNSEL FOR RESPONDENTS

Comes now THOMAS H. WAKEFIELD and makes his appearance before the Supreme Court of the United

States for and on behalf of the Respondent, Llewellyn Machinery Company.

THOMAS H. WAKEFIELD

QUESTION PRESENTED

Should the Supreme Court of the United States Grant a Miller Act Surety Company's Petition for Writ of Certiorari from an Order of a United States Court of Appeal Holding That the Said Surety Company is Bound by the Terms of His Principal's Contract To Pay a Materialman for Loss or Damage to Construction Equipment Rented for Use in a Miller Act Project?

Statement of the Case

To enlarge somewhat on the facts as presented in the paragraph of the Petitioners concise statement of the case (Page 7 of Petition), the Contractor, Thompson Contracting Company, Inc., rented certain equipment from Llewellyn Machinery Company, the Respondent herein, and agreed to "assume all responsibility for damage or loss" to the said equipment (R-25-45), as well as agreeing to pay a stated monthly rental. The equipment had been delivered to the Contractor and placed entirely in its custody and control, and the Materialman-Lessor had completely relinquished possession of the equipment prior to its loss. (R-47)

Except to point out the irrelevancy of the facts as elaborately stated in the second paragraph of the Petitioner's concise statement of the case (Page 7 and 8 of

Petition"; we have no other objections to the facts as presented therein. The significance of any subsequent agreement of the Contractor and Lessor is clearly not before the Court at this time. The Order of the United States District Court for the Southern District of Florida further confirms the irrelevancy of said agreement by concisely stating that the claim did not come "within the purview of the Miller Act" (R-50). The only significance of such a presentation of facts is possibly to demonstrate to this Court that the decision below was not a final determination of the case at bar, since the matter has been remanded to the said District Court for further proceedings and a trial on the merits.

ARGUMENT

It has been suggested that the Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but which should be decided by this Court. That Court has held only that a Miller Act surety is bound by its principal's promise to pay for "loss or damage" to leased equipment while in the possession of the principal (Miller Act Contractor) for use on a work project of the United States.

We respectfully submit that such a holding, based on the peculiar facts before the Court below, have been long since at least impliedly accepted by this Honorable Court. In **Fidelity and Deposit Co. v. United States for the use of Smoot, 187 US 315, 23 S.Ct. 120, 47 L.Ed. 194**, this Court affirmed an opinion of a lower court (20 App. D.C. 376) which held,

" . . . Having voluntarily entered into the obli-

> gation, he (the surety) takes it with its burdens, one of which is that he is charged with the knowledge of his principal."

Thus it is clear that the surety was charged with knowledge of the terms of the contract provisions as well as the risk involved in this particular work project. There are no cases decided which would even remotely suggest that in the situation presented in the case at bar, the respondents should not be entitled to recovery. To the contrary, the language of the **Miller Act, 49 STAT. 793 (1935), 10 USC 270 a-d (1952)** affirms that those persons supplying materials for United States projects are to be "paid in full".

The plain meaning of such language contemplates payment for "loss or damage" to equipment when so promised by a contractor as payment for the use of the equipment. When "construed liberally" in accordance with this court's decision in **Illinois Surety Company v. John Davis Co., 244 US 376 (1917)** there can be no doubt that the purpose of the Miller Act is to insure payment to such materialmen as the Respondents herein who were induced by the principal to lease equipment for use in a project of the United States. To cast dispersion on this Court's ruling providing for a liberal construction of the Miller Act to effectuate the intent of Congress, by referring to it as an "overused cliche", does not lessen the effect of that decision.

Although the facts of this case are perhaps unusual in that the contractor promised to pay for loss or damage to leased equipment in consideration for its use, and the equipment was transported over the high seas subjecting

it to extraordinary risks which caused its loss, the decision is merely an application of settled law to an ordinary business situation.

The decision by the Court of Appeals in this instance is not nearly as far reaching as the decision in **Massachusetts Bonding Ins. Co. v. United States for the use of Clarksdale Machinery Co.**, 88 F.2d 388 (5th Cir. 1937) where costs of repair to leased trucks far in excess of the value of the trucks themselves were allowed because of the peculiar nature of the work which required the repairs to be made rather than allowing the trucks to be replaced. Had the equipment, in this instance, been repaired (salvaged from the bottom of the sea) the cost would have exceeded its value, and the situation would have been similar to that in the **Massachusetts Bonding Ins. Co. Case, supra.** However, in the case at bar, it was not necessary to retrieve the equipment so that only its fair value (the lesser amount) was allowed here.

The decision of the Court below is certainly not only in accord with the **Massachusetts Bonding Ins. Co. Case,** supra, but it is also in accord with the decision of the Court of Appeals for the Fourth Circuit, **United States for the use of Norfolk So. Ry. v. Taylor, 268 F. 635 (1920). Affirmed 277 F. 945 (Fourth Cir. 1921)** where cost of extensive repairs to leased barges were allowed because the contractor had promised to make said repairs. The Court there only enforced the terms of the rental contract, which is all that was done by the court below in this case.

The decision clearly does not contemplate that a surety is liable for "the replacement value" of material purchased by a contractor, but is limited to those cases

where damage or loss to "leased" equipment occurs when in the possession of a contractor for use on a Miller Act project, **and** the contractor has promised to pay for such loss or damage as consideration for the use of equipment. It is not suggested that such an agreement is unconscionable.

CONCLUSION

We respectfully assert that there is no reason for this Honorable Court to accept jurisdiction of this case in accordance with the Petition for Writ of Certiorari, since the decision of the Court below is in accord with a previous decision of that court as well as the decision of another circuit. Further, there are no cases decided in any way contrary to the decision below.

In addition, although the factual situation in this instance is perhaps unusual, this Court has repeatedly affirmed the doctrines upon which the lower court's decision is based. Certainly there are no cases decided by this Court which would suggest any other result than that reached by the Court of Appeals for the Fifth Circuit, and in fact the decision below is consistent with the Miller Act as interpreted on numerous occasions by this Court. To have disallowed the claim would have amounted to a gross conflict with the wording of the Miller Act as well as the decisions of this Court.

Therefore, we respectfully move that the Petition for Writ of Certiorari be quashed and dismissed and the cause be allowed to proceed in the United States District Court for the Southern District of Florida, in accordance

with the mandate of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IT IS HEREBY CERTIFIED that copy of the foregoing Respondent's Brief in Opposition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit was mailed to Mr. Walter Humkey, Attorney for Petitioner, National Surety Corporation, 401 Industrial National Bank Building, Miami, Florida, and to Mr. Frank M. Harris, Attorney for Petitioner, Union Trust Company, 428 First Federal Building, St. Petersburg, Florida, this 5th day of November, 1959.

THOMAS H. WAKEFIELD